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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. ———

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

E & B BREWING COMPANY, INC., AND DRIVERS AND HELPERS LOCAL NO. 38, INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK & DISTILLERY WORKERS OF AMERICA, AFL-CIO,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Drivers and Helpers Local Union No. 38 respectfully requests that this Honorable Court refuse to issue a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit entered in this case on April 5, 1960.

COUNTERSTATEMENT OF QUESTION PRESENTED

The Question Presented in the Petition states erroneously, that the agreement required that all applicants must be "approved" by the Union. It also states, erroneously, that the agreement did not provide "adequate assurances

that such approval would be exercised on a non-discriminatory basis." In the interest of accuracy, Respondent Union submits the following as its counterstatement of the question presented:

Whether, in the circumstances of this case, the National Labor Relations Board properly held that the Union and the Employer had violated the provisions of the Act forbidding discrimination in employment on the basis of union membership by effecting the discharge of an employee pursuant to the terms of an agreement which required (a) that all applicants for employment must be referred by the Union, (b) that applicants referred by the Union must be satisfactory to the Employer, and (c) that there must be no discrimination in the referral of employees based upon their union membership or nonmembership.

ADDITIONAL STATUTE INVOLVED

In addition to the pertinent provisions of the National Labor Relations Act, as amended, cited in the Petition for a Writ of Certiorari, Sections 5 and 10 of the Administrative Procedure Act, 5 U.S.C. Sec. 1001, are also involved. They provide, in pertinent part, as follows:

> "Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . . (a) Persons entitled to notice of an agency hearing shall be timely informed of . . . (3) the matters of fact and law asserted."
>
> * * *
>
> "Sec. 10 (e). Scope of review. So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency

> action. It shall . . . (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; . . ."

ADDITIONAL STATEMENT OF THE CASE

A. The Board's Findings of Fact

The only findings of fact in this case were made by the Trial Examiner in his Intermediate Report (B.A. 12a-20a).[1] These were adopted in their entirety by the Board which made no independent findings of fact (B.A. 2a).

Therefore, in substitution for the statement of facts set out in the Petition, the Union refers the Court to the findings of fact made by the Trial Examiner (B.A. 12a-20a) which were summarized as follows in the Decision and Order of the Board (B.A. 2a):

> "In his Intermediate Report the Trial Examiner found, and we agree, that the Company and the Union had an industry-wide exclusive hiring-hall contract, which the Union agreed to operate without discrimination against non-members; that the Company did not follow the contractual procedure for employing Pfeiffle as a truck driver (to wit: by applying to the Union's employment office or hiring hall); that the Union on or about March 8, 1957, and again on March 12 advised the Company that it had violated the contract by failing to fill the position through the Union's

[1] References designated "B.A." are to pages of the appendix to the Board's brief in the Court below; those designated "U.A." are to pages of the appendix to the Union's brief in the Court below; those designated "Bd. Br." are to pages in the Board's brief in the Court below; those designated "Pet." are to pages in the Petition for a Writ; and those designated "Pet. App." are to the Appendix to said Petition.

hiring hall and by filling it with a nonmember, that on March 19 and thereafter the Union dropped its objection based on Pfeifle's nonmembership, and demanded his discharge solely in order to force the Company to comply with the hiring-hall clause of the contract; that for the same reason the Union refused the Company's request to clear Pfeifle, but at the same time agreed to refer Pfeifle to any other employer covered by the industry-wide contract; and that the Company accordingly discharged Pfeifle on or about March 21 with the explanation that the discharge was due to the pressure from the Union."

In addition, the Trial Examiner made the following findings which were also adopted by the Board: that the Union customarily honored requests by employers, including Respondent Company, that specified non-union individuals be referred (B.A. 18a); that no such request was made by Respondent Company in the instant case until almost a month after Pfeifle had been hired in derogation of the hiring-hall clause of the contract (ibid); that for the Union to have honored the request at that late date would have condoned the Company's prior breach of the hiring-hall clause and nullified the clause entirely (ibid); that the "whole trouble here" stemmed from Pfeifle's attempt to secure preferential treatment for himself (B.A. 19a); that the hiring hall was being run in a non-discriminatory manner (ibid); that there was no discrimination against Pfeifle based upon his nonmembership in anything which the Union did in this case (ibid); and that the Union was merely insisting upon compliance with the hiring-hall clause of its contract (B.A. 20a).

The hiring-hall clause expressly barred discrimination by the Union and it gave the Employer the right to reject applicants referred by the Union if they were not "satisfactory to the employer" (B.A. 13a-14a).

B. The Board's Decision and Order

To the discussion of the Board's Decision and Order which is contained in the Petition, Respondent Union would add only the following:

As stated above, the Board affirmed the findings of the Trial Examiner including his finding that the Union, in the final analysis, demanded the discharge of Pfeifle solely to force the Company to comply with the hiring-hall clause of the contract and not for any reason having to do with Pfeifle's membership or non-membership in the Union (B.A. 2a, 17a, Bd. Br. 10). The Board also affirmed all of the rulings of the Trial Examiner (B.A. 2a) including his ruling that the legality of the hiring-hall provision in the contract was not in issue (U.A. 1b-3b, Decision of Court below, fn. 9). Moreover, the Board declared in its decision, "Here the General Counsel has not alleged that there was a substantively unlawful contract or hiring practice" (B.A. 4a) as, indeed, it had to, in view of the statement made by the General Counsel at the hearing. "We are not trying to throw out the whole hiring hall. We are saying that there was discrimination with respect to the individual himself." (U.A. 3b)

Despite the affirmative finding of no discrimination against Pfeifle based on union membership or non-membership, and the admitted absence of any issue in the case involving the legality of the hiring-hall provision, the Board concluded that the hiring-hall provision was unlawful on its face and thereby rendered the discharge of Pfeifle an unfair labor practice. The vice of the hiring-hall provision, according to the Board, was its lack of the third of the "protective provisions" promulgated in *Mountain Pacific Chapter of Associated General Contractors*, 119 NLRB 883 (enf. den. 270 F. 2d 425, C.A. 9), namely, the requirement that the agreement must contain a clause

requiring the parties to "post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement."

The Petition states (p. 8, fn. 2) that since "the hiring agreement itself was not alleged to be unlawful in the complaint", it was "considered by the Board only to the extent that it was material to the holding that Pfeifle's discharge constituted an unfair labor practice. *No remedial order was entered with respect to the agreement*" (italics supplied). However it is to be noted that the Board's Order required the Union to cease and desist from causing the Company to discriminate in violation of Section 8(a)(3) of the Act, and from in any manner restraining or coercing employees in the exercise of their rights under Section 7 of the Act (B.A. 6a). It is also to be noted that the Board contends that an exclusive hiring hall without the three prescribed protective clauses "on its face satisfies the statutory requirements for establishing a violation of Section 8(a)(3) and 8(b)(2) of the Act" (Bd. Br. p. 37 ff, Pet. p. 8), and that such an agreement also, *per se*, "constitutes unlawful coercion in violation of Section 8(b)(1)(A) and 8(a)(1) of the Act" (Bd. Br. p. 55 ff, Pet. p. 8). Therefore, it is evident that the Board's Order, although not explicitly directed against the agreement, was in fact directed against it, since compliance with the Order would be impossible unless the agreement were nullified.

REASONS FOR DENYING THE WRIT

1. The Board argues that the disposition of the present case is dependent on the Court's action in *Local 357, International Brotherhood of Teamsters* v. *National Labor Re-*

lations Board, No. 64, this Term, certiorari granted June 27, 1960. This is not necessarily so. To be sure, a reversal of the judgment of the District of Columbia Court of Appeals in the *Local 357* case because of this Court's rejection of the *Mountain Pacific* doctrine would be dispositive of the instant case. On the other hand, affirmance of the judgment of the District of Columbia Court of Appeals in the *Local 357* case should not cause a reversal in the instant case because (a) there are material factual differences between the two cases, and (b) in the instant case the Court below refused to enforce the Board's Order on two additional grounds which are completely valid even if this Court should hold that the Board has the power to outlaw all hiring-hall agreements which do not contain the *Mountain Pacific* protective provisions. Since these two additional grounds do not present questions justifying review by this Court, certiorari should be denied.

2. The material factual differences between the instant case and *Local 357, International Brotherhood of Teamsters* v. *NLRB*, *supra*, are the following: In the *Local 357* case none of the three so-called protective clauses prescribed in the *Mountain Pacific* case was contained in the contract. In the instant case the contract contained categorical prohibitions against discrimination or coercion by the Union and a specific reservation by the employer of the right to reject applicants who were not qualified in the opinion of the employer. It lacked only the third of the protective clauses which calls for the posting of the provisions governing the hiring hall.

In our brief to the Court below (p. 21) we reiterated the assertion contained in our reply brief submitted to the Board that "as far as the third of the new criteria is concerned, this, of course, is not contained in the contract and very likely was not contained in any contract in the United States prior to the publication of the Board's deci-

sion in *Associated General Contractors* (i.e. *Mountain Pacific*)." This assertion has never been challenged by the Board. Yet, merely because the contract lacked a provision the need for which would not have been foreseen by even the most learned and astute labor negotiators, the contracting parties have been held guilty of unfair labor practices.

The second material difference between the instant case and the *Local 357* case is that here there were affirmative findings by the Trial Examiner, adopted by the Board, negating any discrimination against the employee in question and negating any inference that the hiring hall was operated in discriminatory fashion. On the latter point the Board affirmed the Trial Examiner's finding that "the hiring hall, at least for the purposes of this case, was being run in a non-discriminatory manner" (B.A. 19a). Thus, the Board's Decision presents the anomaly of affirmative findings that there was no discrimination against the employee in question or in the administration of the hiring hall thus totally rejecting the unfair labor practice allegations of the Complaint; and the conclusion that the employee was discriminated against because the hiring hall was, as a matter of law, discriminatory because it lacked the third protective provision belatedly conceived by the Board. There appears to be no way of reconciling the Board's findings with its conclusions.

3. In any event, the question in this case is a much narrower one than that presented by the *Local 357* case and may be briefly stated as follows: Does the absence of the third of the Mountain Pacific protective clauses render a discharge discriminatory even when the Board has found affirmatively that there was no discrimination against the individual and no discrimination practiced in the operation of the hiring hall?

The first two protective clauses are apparently intended to guarantee that a hiring hall will not be operated as a virtually closed shop which, in the Board's view, is what renders it unlawful. Thus, the Board stated in its *Mountain Pacific* decision (p. 896):

> "We agree with Senator Taft, the principal proponent of the 1947 Taft-Hartley amendments, who stated that Section 8(b)(2) 'was not intended to put an end to all hiring halls, but only those which amount to virtually closed shops.'"

However, the third protective clause, which requires the posting of provisions relating to the operation of the hiring hall, is intended to be informational only and does not go to the substantive requirement of non-discriminatory referral of applicants. Therefore, even assuming, arguendo, that the promulgation of the *Mountain Pacific* doctrine was otherwise within the Board's authority, there appears to be no justification for holding a hiring hall illegal merely because it lacks the third protective clause, a purely informational requirement, in the face of affirmative findings which negate any discrimination in the operation of the hiring hall.

4. For the reasons stated in its brief in the Court below, Respondent Union submits that the *Mountain Pacific* doctrine is invalid in its entirety, being a gross example of administrative agency legislation in the guise of statutory interpretation. Since this question has been accepted for review by this Court in the *Local 357* case it would be redundant to argue it further here. However, since the avowed purpose of the *Mountain Pacific* doctrine is to relieve the Board of the burden of case-by-case adjudication of the discriminatory character of exclusive hiring halls, this Court's opinion in *National Labor Relations Board* v. *Insurance Agents International Union*, decided February 23, 1960, 4 L. Ed. 2d 454, is clearly in point (p. 470):

> "We think the Board's resolution of the issues here amounted not to a resolution of interests which the Act had left to it for case-by-case adjudication, but a movement into a new area of regulation which Congress had not committed to it. Where Congress has in the statute given the Board a question to answer, the courts will give respect to that answer; but they must be sure the question has been asked."

5. The retroactive application of the *Mountain Pacific* doctrine to this case constituted arbitrary and capricious agency action and an abuse of discretion within the meaning of Section 10(e) of the Administrative Procedure Act (5 U.S.C. Sec. 1009(e)).

(a) The Court below approached this question on the basis that the test is whether "the practical operation of the Board's change of policy . . . (will) work hardship upon respondent altogether out of proportion to the public ends to be accomplished." *Securities and Exchange Commission* v. *Chenery Corp.*, 322 U.S. 194. In weighing the "public ends to be accomplished" against the hardship upon the respondents, the following facts are relevant: (1) The contract in question had been executed about three years before the *Mountain Pacific* decision and conformed to the law as then interpreted by the Board and the Courts.[2] (2) The contract had expired on April 1, 1958, several months before the Board's decision was issued in the instant case, and on the same day that the *Mountain Pacific* doctrine was published by the Board. (3) The findings of the Trial Examiner adopted by the Board established that the "whole trouble here" stemmed from Pfeifle's at-

[2] *The Hunkin-Conkey Construction Co.*, 95 NLRB 433; *National Union of Marine Cooks and Stewards*, 90 NLRB 1009; *Pacific Shipowners Association*, 98 NLRB 582, 584; *National Labor Relations Board* v. *Siemerton*, 202 F. 2d 511 (C.A. 9) cert. den. 346 U.S. 814; *National Labor Relations Board* v. *McGraw and Co.*, 206 F. 2d 635 (C.A. 6); *Eichlay Corporation* v. *NLRB*, 206 F. 2d 799 (C.A. 3). See also Seventeenth Annual Report of the National Labor Relations Board, 1952, p. 149.

tempt to secure preferential treatment for himself (B.A. 19a) rather than from discrimination against him. (4) As previously stated, the findings establish that Pfeifle was not discriminated against because of membership or non-membership in the Union and that the hiring hall had been operated in non-discriminatory fashion.

On these facts and without bothering to ascertain whether the parties had conformed their hiring-hall provisions with the *Mountain Pacific* requirements in their new contract which had gone into effect on April 1, 1958, the Board held the parties guilty of unfair labor practices because of the *ex post facto* illegality of their expired contract, ordered them to cease and desist, to reinstate Pfeifle with back pay, and to post prescribed notices to all union members and all employees (B.A. 6a-8a). Of no import to the Board was the fact that Pfeifle's reinstatement would presumably require the displacement of another employee. In these circumstances the Court below was clearly correct in concluding:

> "In weighing these matters here we are impressed with the fact that there appears no reason why the public interest demands that the new rule be imposed at once, and now, as to this particular contract."

(b) The case of *Leedom* v. *Local 108, International Brotherhood of Electrical Workers* (C.A.D.C.) decided March 24, 1960, 45 LRRM 3005, relied on by the Board, does not support its position. That case did not involve unfair labor practice charges but was a representation case involving the right of the Board to impose its revised contract bar rule to previously executed contracts. While holding that the Board might thus apply its contract bar rule, the Court indicated that a contrary result might obtain if the retroactive application of a new rule "made conduct actionable which theretofore had not been actionable."

Distinguishing between the unfair labor practice cases relied upon by the Union and the problem raised by the contract bar rule in representation cases, the Court stated:

> "Finally, and perhaps most important, the Board in the cases upon which the Union relies had readily available alternatives which were not present here. By announcing its new rules prospectively in order to allow the parties involved time to bring their practices and agreements into conformity with the new requirements, it could have avoided proscription of past conduct which was presumably legal when undertaken. Here in the nature of the problem the Board could not promulgate these rules prospectively without having to wait up to five years to put its new policies into full effect. This drag on the administrative process would tend to destroy its flexibility."

In the instant case the Board could, of course, have announced its new rule prospectively in order to allow employers and unions time to bring their practices and agreements into conformity with new requirements and could thus have avoided the proscription of past conduct which was presumably legal when undertaken.

(c) In a closely analagous case: *National Labor Relations Board* v. *International Brotherhood of Teamsters*, 225 F. 2d 343 (C.A. 8), the Court refused to enforce an order of the Board finding the respondents guilty of unfair labor practices because of their execution of a contract which conformed to the then prevailing Board doctrine with respect to the delegation to a union of authority to determine seniority problems but which the Board had held unlawful following a change in the Board's position on the legality of such a provision. The Court stated:

> It does not seem to us to make either legal or common sense to say that the Board's rulings are wholly without any sanctity under the Act as a guide

> for employer and union conduct and that the Act intends that anyone who relies upon and uses the Board's rulings as a basis for his actions shall be left subject to entrapment and branding as a perpetrator of an unfair labor practice in what he has thus done, if the Board thereafter chances, by reason of change in personnel or otherwise, to depart from one of its previous positions and rulings."

See also *National Labor Relations Board* v. *Guy F. Atkinson Co.*, 195 F. 2d 141 (C.A. 9), and *Pedersen* v. *National Labor Relations Board*, 234 F. 2d 117 (C.A. 2).

(d) The Board itself has recognized this principle. In *Screw Machine Products*, 94 NLRB 1609, an unfair labor practice was committed at a time when the Board was not asserting jurisdiction over the employer. After the Board had revised its jurisdictional standards, a complaint was issued against the employer based upon said unfair labor practices. In dismissing the complaint the Board stated:

> "This result is dictated not only by the Board's obligation to respect its own prior decisions but also by desire for fair play."

Similarly in *Almeida Bus Service*, 99 NLRB 498, 501, the Board affirmed its "reluctance to impose statutory sanctions against a party for conduct committed after advice and notice from the Board that its conduct would not be actionable . . . (and) that it would not be equitable to make findings of violation of the Act." See also *Tom Thumb Stores Inc.*, 95 NLRB 57

(e) Notwithstanding its own recognition of the principle that statutory sanctions should not be imposed against a party for conduct committed after advice and notice from the Board that its conduct would not be actionable, and notwithstanding that the hiring provisions in the instant

contract and in innumerable other contracts throughout American industry were negotiated in good faith in conformity with the then prevailing doctrine of the Board that such contracts were lawful, the Board now attempts to defend its attempt to brand the parties to all such contracts — indeed, to virtually all hiring-hall agreements in existence at the time of the *Mountain Pacific* decision — as being violators of the law.

It is respectfully submitted that the ruling of the Court below that the Board's order constituted an abuse of discretion within the meaning of the Administrative Procedure Act, was clearly correct.

6. The legality of the contract was not in issue in the proceedings before the Board.

(a) It is clear beyond peradventure that the validity of the contract was not in issue. There is no allegation as to the illegality of the contract in the complaint and the Board's General Counsel stated at the hearing:

> "We are not trying to throw out the whole hiring hall. We are saying there was discrimination with respect to the individual himself." (C.A. 35, Pet. App. 24, fn. 9)

The Trial Examiner ruled that the validity of the hiring hall was not in question and his ruling was affirmed by the Board (ibid.). It was conceded by the Board in its brief to the Court below (p. 65) that the validity of the contract was not in issue at the hearing. Nevertheless, the entire basis for the Board's Order is its finding that the contract was illegal on its face and the effect of its Order is to require the nullification of the contract.

(b) In defense the Board now argues that "The violation found in this case and the remedial order of the Board are limited to the discriminatory discharge of Pfeifle." This contention borders on the frivolous since,

as pointed out above, the Board's Order directs the Respondents to cease and desist from violating Sections 7, 8 (a) (1), 8 (a) (3) and 8 (b) (2), and the Board's basic contention here, as in the Court below, is that the existence of a hiring-hall provision lacking the prescribed protective clauses is *per se* a violation of those sections. Therefore, although on its face the Board's Order is not directed against the contract, the continued application of the contract would constitute a violation of the Board's Order to the same degree as would be the case if the Board's Order specifically invalidated the contract. Further, if, as contended by the Board, the issue of the validity of the contract was, in fact, litigated, why did the Board not expressly invalidate the contract in its Order instead of taking an indirect route to reach the same objective?

(c) The Board argues further that it is authorized to pass upon an issue which, although not directly raised by the pleadings, is indispensable to a decision of the question specifically presented (Pet. p. 11). This generalization can have no application to the instant case where the issue presented was whether there had been discrimination against the employee himself, where the Board's General Counsel specifically disavowed any attack on the legality of the hiring hall, and where the "law of the case" as established by the Trial Examiner's ruling and the Board's affirmance of that ruling is that the validity of the hiring hall was not in contention. When the theory upon which the case was prosecuted was washed out by the finding that there had been no discrimination against Pfeiffer, the Board introduced a completely new theory based upon the *ex post facto* application of the *Mountain Pacific* doctrine. Far from having been "directly raised by the pleadings" this issue had been excluded from consideration by the Trial Examiner's ruling at the hearing which was affirmed by the Board. Far from having been "indis-

pensable to decision of the question specifically presented", it was, under "the law of the case" irrelevant to the decision of the question specifically presented.

(d) The Board also argues that the Respondents were afforded an opportunity to present their positions on the applicability of the *Mountain Pacific* doctrine. The basis for this contention is that after the *Mountain Pacific* decision was published following the issuance of the Intermediate Report in the instant case, the Board's General Counsel filed a supplemental brief with the Board urging that the *Mountain Pacific* decision be applied here. Respondent Union urged that the Board could not properly consider that contention because the validity of the hiring-hall provision was not in issue and had not been litigated (Pet. App. p. 24-25, fn. 10). As Respondent Union stated in its brief to the Court below:

> "The Board's Brief states that the Union did not question the validity of the *Mountain Pacific* decision. However, reference to the Addendum to the Union's Reply Brief, which was filed with the Board and which is before this Court, will show that the Union stated that the General Counsel had raised 'a completely new issue in the case' based upon the *Mountain Pacific* decision, that 'there is no basis upon which this contension can now be considered', that to apply retroactively the *Mountain Pacific* decision 'could not be justified on any theory consistent with the fair and proper administration of the law'. In the Reply Brief which the Union had submitted earlier, the Union charged the General Counsel with having reversed his position as stated at the hearing by now contending that the hiring hall was unlawful and that it was discriminatorily administered (Union's Reply Brief 3). The Union urged that the contention that the hiring hall was unlawful should not be entertained by the Board and requested that the case be remanded for further hearing if the contention of illegality being

made by the General Counsel were to be considered (p. 4-5)."

The Court below correctly concluded:

"Since the Board was without power to consider any such issue it is hard to perceive why the Union was called upon to debate the *Mountain Pacific* case or to offer evidence on a non-existent issue."

The Court further held that "The Board cannot establish its attempted rule by an adjudication of a matter not in issue before it. In the absence of the statutory notice of 'the matters of fact and law asserted', the Board lacked power to pass upon any such issue as that now tardily argued in its briefs."

(e) The cases cited in Petitioner's brief at page 12, *Yakus* v. *United States*, 321 U.S. 414, 435, *Federal Communications Commission* v. *W.J.R.*, 337 U.S. 265, *Fay* v. *Douds*, 172 F. 2d 720, have no application to the instant case since, among other reasons, none of them dealt with a situation in which the issue upon which the decision was predicated had not only not been raised by the pleadings, but had been specifically removed from contention at the hearing. Further, Section 10(b) of the National Labor Relations Act specifically requires that the respondents must be served with a complaint "stating the charges in that respect and containing a notice of hearing." It provides further that the Board may amend the complaint "at any time prior to the issuance of an order based thereon." In the instant case the statute placed no burden upon the Respondent Union to argue with respect to a non-existent issue, but it required the Board to amend its complaint prior to the issuance of its decision and provide Respondent an opportunity to make answer and litigate the new issue.

(4) The Board has consistently held that it will not predicate findings and orders upon matters which were not litigated at the hearing. *Starrett Brothers & Eken, Inc.*, 92 NLRB 1757-1759; *International Longshoremen's and Warehousemen's Union et al.*, 94 NLRB 1091, 1092, 1095, fn. 9; *Newspaper and Mail Deliverers Union of New York and Vicinity*, 101 NLRB 589; *Pacific Intermountain Express Co.*, 107 NLRB 837, 842, *Hunter Engineering Co.*, 104 NLRB 1016, 1017, fn. 4. In *International Brotherhood of Teamsters*, 108 NLRB 1008, 1011, a closely analagous case, the Board refused to consider the General Counsel's "exception to the Trial Examiner's failure to find that one of the contract provisions was unlawful because it reposed in Local 710 the authority to settle controversies dealing with seniority." The Board there held:

> "As this allegation was not made in a complaint and was not litigated at the hearing, we do not pass on this exception."

Finally, the Board argues in its Petition:

> "Since the Board's *Mountain Pacific* doctrine is a rule of law the applicability of which to a given hiring hall agreement is not affected by extrinsic evidence, the opportunity afforded in this case to present written argument on the issue satisfied the requirements of a fair hearing."

This begs the question since it presupposes that there was in fact an issue in the case as to the legality of the hiring agreement. There was in fact no such issue unless it be contended that a new issue can be created by a contention made in the General Counsel's brief to the Board rather than by amendment of the complaint. Absent an amendment to the complaint it is submitted that the parties were entitled to rely upon the issues as framed by the

pleadings and as denied and litigated at the hearing as constituting the issues which would be the basis for the Board's adjudication.

CONCLUSION

Respondent Union therefore submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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